

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

**KIMBERLY C. CUTONE and  
ANTHONY CUTONE,**

**Plaintiffs,**

V.

ELI LILLY AND COMPANY,

**Defendant.**

**CIVIL ACTION No. 04-CV-12725 (JLT)**

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs Kimberly C. Cutone (“Ms. Cutone”) and Anthony Cutone (collectively “Plaintiffs”) and oppose Defendant Eli Lilly and Company’s (“Lilly”) Motion for Summary Judgment. As grounds therefore, Plaintiffs state that there are genuine issues of material facts in dispute upon which a reasonable juror could find that Ms. Cutone was exposed to Defendant Lilly’s brand of Diethylstilbestrol (“DES”):

1) Ms. Cutone's mother recalls that she was prescribed pills called "Diethylstilbestrol" to prevent a miscarriage, and that the pills were white, round, and cross-scored. Lilly's DES matches her physical descriptions of the pill exactly.

2) Ms. Cutone's mother filled her Diethylstilbestrol prescription in Allston, a section of Boston, Massachusetts. Pharmacist Harold B. Sparr, who was the President of the Massachusetts Board of Registration and the Massachusetts College of Pharmacy Alumni Association, has worked in the Boston area for the last sixty-two years and is familiar with that locality's retail pharmaceutical marketing. Mr. Sparr observed drugstores in the area and their

customs and practices. He testified that a prescription for diethylstilbestrol would have only been filled with Lilly's brand of DES exclusively at that time and in that place.

3) Ms. Cutone's mother identified the Lilly DES pill from a photographic line-up as the pill she ingested while pregnant with Ms. Cutone. At her deposition, Lilly failed to contradict Ms. Cutone's mother with photos or prototypes of any other manufacturer's products. By their failure to confront Ms. Cutone's mother at the deposition with an alibi or a photo of an alternative pill, they tacitly acquiesced in her identification of the Lilly product. Likewise, Lilly presents nothing to support their contention that a non-Lilly brand of DES matching the mother's description was present or available in Boston in 1969-1970.

4) Lilly, unlike any other manufacturer, sold only through wholesalers, never direct. The wholesaler in Boston conformed to the Lilly national practice whereby the Lilly brand of DES had to be given preference by the wholesaler over any other brand.

5) By their own admission, Lilly dominated the DES market with control of at least 75% of the national share.

6) Numerous other court decisions have allowed cases with weaker DES identification proof to go to the jury.

7) Further reasons and evidence are detailed in Plaintiffs' Memorandum of Points and Authorities filed herewith, upon which a reasonable jury could find for the Plaintiffs.

8) Plaintiffs' ancillary claim for loss of consortium could prevail at trial and summary judgment ought to be denied.

And for such other and further reasons as set forth in Plaintiffs' memorandum and appendices attached.

**WHEREFORE**, Plaintiffs pray that the Court deny the Defendant's Motion for Summary Judgment.

**Request for Hearing**

The Plaintiffs request that the Court grant oral argument on this motion.

Respectfully submitted,

/s/ Erica Tennyson

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Dated: May 25, 2006

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I, Erica Tennyson, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on May 25, 2006.

s/ Erica Tennyson

Erica Tennyson (BBO# 660707)